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No. 92-402

In The

Supreme Court of the United States

October Term, 1992

ROBERT NICHOLS, *et al.*,

Petitioners,

vs.

MICHAEL ROMBERG and DEBRA ROMBERG,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents disagree with the formulation of the question presented, and contend that it is both too specific and too fact-specific, and respondents contend that the question presented should be:

Does an award of nominal damages to plaintiffs in an action brought pursuant to 42 U.S.C. 1983 (1982) preclude an award of attorneys' fees to those plaintiffs pursuant to 42 U.S.C. 1988 (1988)?

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ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The respondents Michael Romberg and Debra Romberg agree that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in *Romberg v. Nichols*, WL 152118, (9th Cir. 1992), on July 7, 1992, and request that this Court affirm the judgment and opinion in all respects.

OPINION BELOW

Respondents agree that the material set forth in the Opinions Below section of the Petition is accurate.

JURISDICTION

Respondents agree with the material set forth at the Jurisdiction section of the Petition.

STATUTE INVOLVED

Respondents agree with the material set forth at the Statute Involved section of the Petition.

STATEMENT OF THE CASE

Respondents, Michael Romberg and Debra Romberg, believe petitioners' Statement of the Case is inaccurate. Accordingly, respondents incorporate by reference the Court of Appeals' statement of the facts as set forth on pages A-10-A-23 of petitioners' Appendix A.

REASONS FOR GRANTING THE WRIT AND FOR AFFIRMING THE JUDGMENT AND OPINION

It is warranted for this Court to review the judgment and the opinion of the Court below for three reasons. (1) This issue now is pending before this Court in *Farrar v. Hobby*, 112 S. Ct. 1159 (1992) (No. 91-990) (certiorari granted), in which the Court below denied an award of attorneys' fees to a plaintiff who was awarded nominal damages in a Section 1983 action. It appears that the resolution of that case will be dispositive of the issue in this case, and respondents in this case in fairness should be permitted to make their arguments to this Court. (2) It is important for this Court to clarify what some contend to be a permissible interpretation of this Court's holding in *Texas State Teachers' Assn. v. Garland*, 489 U.S. 782 (1989), that a "technical or *de minimis*" victory in a civil rights case precludes an award of Section 1988 attorneys' fees: to wit, that an award of nominal damages constitutes a technical or *de minimis* victory, and therefore precludes an award of attorneys' fees. (3) There is a significant conflict among the circuit courts of appeals on the issue of whether *Garland* applies to define a technical

or *de minimis* victory as one in which nominal damages are awarded.

I

BECAUSE THE *FARRAR* CASE NOW BEFORE THIS COURT WILL BE DISPOSITIVE OF THE ISSUE RAISED BY THE PETITION HEREIN, FAIRNESS REQUIRES THAT RESPONDENTS BE PERMITTED TO ADDRESS THIS COURT ON THIS PETITION.

As set forth above, the issue presented by the Petition now is before the Court.

Petitioners' counsel herein has submitted a brief *amicus curiae* in that case, and thus has presented petitioners' arguments to this Court in that case. Respondents herein contend that fairness requires that this Court consider their arguments on this issue by considering their Response to the Petition. (A motion is filed simultaneously with this Response in which Respondents seek to have this Petition consolidated with the *Farrar* Petition, and seek leave for permission to participate in oral argument on October 7, 1992 when the *Farrar* case is heard by this Court.)

II

IT IS IMPORTANT FOR THE COURT TO CLARIFY THE SCOPE OF ITS PRIOR HOLDING IN *GARLAND*.

Some circuit courts of appeals, as noted in the Petition, as well as petitioners, contend, respondents assert erroneously, that this Court's holding in *Garland* that a technical or *de minimis* victory in a civil rights case that precludes a plaintiff from an award of attorneys' fees

includes a victory in which nominal damages were awarded. A reading of *Garland* demonstrates that it was not the intention of this Court to preclude an award of attorneys' fees *simply* because nominal damages may have been awarded, and that *Garland* cannot be read to warrant that interpretation.

The reason for this is that such an interpretation of *Garland* would necessitate the logical fallacy known as a category mistake, a phrase coined by Gilbert Ryle in his *Concept of Mind*, 1951. Nowadays, a category mistake colloquially is called "mixing apples and oranges."

The phrase "technical or *de minimis*" in *Garland* was utilized to characterize the substance of the victory achieved, and did not in any wise suggest that such a victory was to be defined in terms of damages. Thus, petitioners' use of the quantity of damages to define the substance of the respondents' victory in this case is a category mistake because petitioners seek to define the issue of liability in terms of damages. Clearly, *Garland's* definition of the substance of the result in no wise was dependent of the amount of damages awarded. *Garland's* analysis as founded upon the change in the legal relationship between the parties, based upon the fact of a finding that one party violated the constitutional right of another party.

Petitioners have seized upon a passage from *Garland*, taken it out of context, and urge it as a predicate for their baseless conclusion. The passage from *Garland*, in full, is as follows:

> The District Court characterized this issue [among many on which plaintiff prevailed] as

> "of minor significance" and noted that there was "no evidence that plaintiffs were ever refused permission to use school premises during non-school hours." . . . *If* this had been petitioners' *only* success in the litigation, we think it clear that this alone would not have rendered them "prevailing parties" within the meaning of § 1988. Where the plaintiff's success on a legal claim can be characterized as purely technical or *de minimis*, a district court would be justified in concluding that even the "generous formulation" we adopt today has not been satisfied.

109 S. Ct. at 1493 (emphases added). It is clear that what this was intended to mean and what it means, in ordinary language usage is this: in the *Garland* case, *if* plaintiffs had prevailed only on the one issue with respect to which their ox never had been gored – because they never asked for permission to use school premises – and thus had gotten what, in effect, would have been an advisory opinion as to them (or a disposition on an issue they would not have had standing to assert had it been brought as a single claim unattached to the other claims on which they prevailed), then their victory would have been technical or *de minimis*. But, that is not what happened: in *Garland*, the victory was not on a claim that was technical or *de minimis*, and therefore, the victory in *Garland* was neither technical nor *de minimis*. Petitioners seek to lift out of context the technical or *de minimis* criterion from *Garland* and to use it as a predicate for a proposition it could not have been intended to support, given the context in which the criterion is set forth in *Garland*. Respondents in this case did not prevail on an issue of the sort that plaintiffs in *Garland* did prevail, but which

was held, almost in dictum from this Court, to be subjunctively, or illustratively, to define what this Court meant by the term "technical or *de minimis*." In *Garland*, this Court concretely defined what it meant by the term "technical or *de minimis*," and its definition includes *only* the vindication of a right that was violated in general, but was not violated as to the person who sought to have its prohibition declared to be unconstitutional. In effect, this Court held that if a plaintiff whose rights have not been directly and concretely violated sues to overturn a regulation, and the regulation is declared to be unconstitutional, then the plaintiff's victory may be declared to be technical or *de minimis*.

In this case, there was a clear and unambiguous jury verdict that petitioners violated respondents' first-order Fourth Amendment right not to have their home invaded without a warrant by the government. That finding removes the issue of an award of attorneys' fees from the *Garland* definition of "technical or *de minimis*." Petitioners' attempt to bring within the *Garland* "technical or *de minimis*" definition an award of nominal damages as a factor to preclude an award of attorneys' fees.

Here, something very serious did happen to respondents: their home was invaded by petitioner deputy sheriffs and *their own* rights were violated in a significant manner. Thus, their victory is neither technical or *de minimis*, and there is a clear, unambiguous change in the legal relationship between respondents and petitioners that did not occur in *Garland*. Neither the award of nominal damages, as requested by respondents' counsel in his summation, nor the wildest extension of the words of *Garland* supports petitioners' argument that an award of

nominal damages in a civil rights case precludes respondents' entitlement to and award of attorneys' fees.

The Ninth Circuit's opinion in this case is both fully supported by the prior case law it cites and by this Court's *Garland* holding. The Ninth Circuit in an opinion not cited by petitioners, but decided over a month before petitioners filed their petition, affirmed its holding in this case. In *George v. City of Long Beach*, 91-55082, 91-55382 (9th Cir. July 31, 1992), 1992 W.L. 179445, it was held that

> The city officers entered [plaintiff's] apartment without a warrant, and without knocking [as in this case].
>
> . . .
>
> The jury ruled against [plaintiff] on all issues and found no damages by reason of the warrantless entry.
>
> George requested a jury instruction on nominal damages which was refused by the district court. In this Circuit, nominal damages must be awarded if a plaintiff proves a violation of his constitutional rights. *Floyd v. Laws*, 929 F. 2d 1390, 1401 (9th Cir. 1991); *Romberg v. Nichols*, 953 F. 2d 1152, 1161 (9th Cir. 1992) (per curiam). *Floyd* clearly held that nominal damages must be awarded "as a symbolic vindication of [the plaintiff's] constitutional right" whether or not the constitutional violation causes any actual damage. *Floyd*, 929 F. 2d at 1403. In light of the court's finding that the officer's warrantless entry of George's house violated the Fourth Amendment, George was entitled to judgment and $1 in nominal damages on his section 1983 claim.

The reason that the jury's finding against George was invalid is that the court of appeals had determined in its prior disposition of the case, 883 F. 2d 1407 (9th Cir. 1989), that the warrantless arrest "was effected unlawfully." 883 F. 2d at 1415. That holding became dispositive on the issue of the lawfulness of the seizure notwithstanding the jury's contrary finding. Thus, the district court's refusal to instruct the jury on nominal damages was erroneous, because plaintiff was entitled to nominal damages. The Ninth Circuit concluded that George "as the prevailing party on significant issues on [his] appeal, . . . entitled [him] to attorney fees for [his] appeal [and that t]he district court shall set the amount of attorney fees on remand." Thus, in *George*, the Ninth Circuit reaffirmed its two prior holdings in both *Floyd* and *Romberg* that status as "the prevailing party on significant issues" entitles a Section 1983 plaintiff to an award of attorneys' fees, and that the issue of damages does not play any part in the definition of "prevailing party on significant issues." Its holding is based on applicable law, is fully consistent with this Court's opinion in *Garland*, and any suggestion that an award of nominal damages precludes an award of attorneys' fees is unsupported.

This Court should affirm the Ninth Circuit in this case and clarify its holding in *Garland* to exclude from the definition of "technical or *de mimimis*" a consideration of damages.

III

THE CONFLICT AMONG THE CIRCUITS WARRANTS CONSIDERATION BY THIS COURT OF THIS CASE.

For the same reason this Court granted certiorari in *Farrar,* and additionally because since the Court granted certiorari several new, conflicting circuit court opinions on the issue have been filed, it is appropriate for certiorari to be granted, and the Ninth Circuit opinion in this case to be upheld.

IV

RESPONDENTS PREVAILED ON A SIGNIFICANT ISSUE IN THIS CASE, HAVE OBTAINED SOME OF THE RELIEF THEY SOUGHT, AND, THEREFORE, ARE PREVAILING PARTIES WITHIN THE MEANING OF SECTION 1988.

Petitioners' argument in essence is that, in a section 1983 action alleging constitutional violations, no matter how egregious the constitutional violation, the victory is technical or *de minimis* if a jury awards nominal damages. From petitioners' argument, it inexorably follows that such a victory never could reach the threshold level to warrant prevailing party status for eligibility for section 1988 attorneys' fees. Petitioners miss the point, that was very clearly articulated in the Ninth Circuit opinion, which stated

> In the realm of civil rights, where Congress and the Courts historically have sought to encourage the vindication of society's most cherished principles for their own sake, a nominal damages award does not a nominal victory make.

Pet. App. A at A-37.

Petitioners gloss over the warrantless search of respondents' residence, which the jury found to be without probable cause, exigent circumstances, or consent, and which was coupled with the false arrest of the respondents. By their actions petitioners attempt to give short shrift to that most cherished maxim, embodied in the Fourth Amendment, that "every man's house is his castle," and that "[o]fficers may break and enter only on notice, to execute a warrant." *Semayne's Case*, 5 Coke's Reports 91a, 77 English Reports 194 (King's Bench Court 1604).

In *Texas State Teachers v. Garland Independent School District*, 489 U.S. 782, 109 S.Ct. 1486 (1989), upon which both the district court and court of appeals relied, in deciding respondents were entitled to "prevailing party" status within the meaning of 42 U.S.C. Section 1988, and hence eligible for an award of attorney's fees, this Court held:

> If the plaintiff has succeeded on "any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit" the plaintiff has crossed the threshold to a fee award of some kind.

Id., at 1493. And as the Court of Appeals concluded:

> [T]he jury's affirmative determination that the defendants violated the Rombergs' important civil rights is enough to render the Rombergs eligible for an award.
>
> . . .
>
> Properly focusing upon the "legal relationship between the parties – and not upon the degree of monetary success achieved by the Rombergs

> – we hold that the Rombergs prevailed on a significant issue within the meaning of *Texas State Teachers*.

Pet. App. A at A-36-37.

Petitioners persist in their refusal to acknowledge that respondents prevailed on a significant legal issue, perhaps for the reason stated by the Court of Appeals, to wit:

> The question [of eligibility for attorney's fees] only becomes close if one begins to confuse – as the defendants apparently have – the issue of liability with the issue of damages. The fact that the jury awarded the Rombergs only one dollar each in damages does nothing to vitiate the fact that the defendants were found liable on the merits of violating the Rombergs' civil rights. Despite the amount of the award, the Rombergs still prevailed on a significant legal issue, and that alone is sufficient.

Pet. App. A at A-32.

Petitioners lean heavily for their argument on the *Farrar v. Cain*, 941 F. 2d 1311 (5th Cir. 1991) *cert. granted sub nom. Farrar v. Hobby*, ___ U.S. ___, 112 S. Ct. 1159, 117 L. Ed. 2d 407 (1992) (No. 91-990), but *Farrar* in turn bases its decision on *Rhodes v. Stewart*, 488 U.S. 1 (1988), and *Hewitt v. Helms*, 107 S. Ct. 1672 (1987), neither of which cases afforded the respective plaintiffs *any relief at all*. In *Hewitt* the victory was technical or *de minimis* by virtue of mootness, and in *Rhodes*, the application of the qualified immunity defense by the district court operated to bar *all* relief. As the court below stated:

> Only the Fifth Circuit has rejected the position that an award of nominal damages makes the plaintiff a "prevailing party" within the meaning of section 1988. *Farrar*, 941 F. 2d at 1311. We believe *Farrar*, which rested on the assumption that "the sole object of [the] suit [was] to recover money damages," *id.* at 1315, is distinguishable on that basis.

Pet. App. A at A-39-A-40.

Petitioners' last ditch effort to persuade this Court that iniquities will follow should this Court not heed their exhortation that an award of nominal damages in a civil rights case be deemed technical or *de minimis*, is to raise the specter of a myriad of civil rights lawsuits being filed merely in the hope of collecting attorney's fees. However, as the Court of Appeals stated:

> Part of a district court's function, however, is to prevent . . . "Solomonic solutions" by the jury. When a jury compromises its verdict, its verdict should not stand. . . . If the district court believed that there was insufficient evidence to support the jury's conclusion that the Rombergs' Fourth Amendment rights had been violated, then it should have granted the defendants' motion for a judgment *non obstante veredicto*. Alternatively, the court could have granted the defendants' motion for summary judgment, directed verdict, or new trial – all of which the court denied.

Pet. App. A at A-44-45.

In fact, as was recognized by this Court in the *City of Riverside v. Rivera*, 477 U.S. 561, 575 (1986) (plurality), the "socially beneficial 'deterrent effect [of civil rights suits]

is particularly evident in the area of individual police misconduct, where injunctive relief is generally unavailable.' " Pet. App. A at A-34-35. As in *Garland*, 109 S. Ct. at 1494:

> [Respondents have] served the "private attorney general" role which Congress meant to promote in enacting the Civil Rights Attorney's Fees Awards Act of 1976. They prevailed on a significant issue in the litigation and have obtained some of the relief they sought and are thus "prevailing parties" within the meaning of Section 1988.

CONCLUSION

The writ of certiorari should be granted, and the Court of Appeals' disposition should be affirmed.

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